ASIA VIDEO ENTERPRISE

v.

LIEW & CO.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J
[CIVIL CASE NO. D5-22-1780-90]
26 SEPTEMBER 1994

PRACTICE & PROCEDURE*: Pleadings - Defence filed out of time - Application to strike out defence - Whether should be allowed - Defendant applying for enlargement of time - Whether permissible.*

The plaintiff applied to strike out the defences filed by the defendant contending that they were filed out of time without obtaining leave of Court for enlargement of time.

The defendant, on the other hand, applied for leave to file the defence out of time.

Held:

[1] The first defence was filed out of time and despite the learned Senior Assistant Registrar setting aside the judgment in default, the first defence would continue to be invalid. While it may not have been wrong for the SAR to have allowed the application to set aside the judgment in default, she should have made an order as to the necessity of filing the defence again as leave was necessary to file the defence at that late stage. Without the leave of the Court, the second defence has also not been properly filed and cannot be considered to be a proper defence.

[2] As for the defendant's application for leave to file a defence out of time, granting the orders prayed for would mean the Court was aiding the negligence of Counsel for the defendant who, after filing the first defence late, never asked the Court for leave or for specific instructions to file the second defence, when it set aside the judgment in default, and had filed the second defence purely on the basis of implication.

[3] It was now too late in the day, after four years and five months, for the defendant to again apply to file the third defence. It is also abundantly clear that the application to declare the second defence valid lacks merit in these circumstances.

[Plaintiff's application in enclosure 18 allowed. Defendant's application in enclosure 40 dismissed with costs]

Cases referred to:

Ong Guan Teck & Ors. v. Hijjas [1982] 1 MLJ 105 ***(refd)***
Tan Chai Heng v. Yeo Seng Choon [1981] 1 MLJ 271 ***(refd)***
Ratnam v. Cumarasamy & Anor. [1965] 31 MLJ 228 ***(refd)***
Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 CLJ 1 ***(refd)***
Abdul Rahman v. Paijah [1937] MLJ Rep. 89 ***(refd)***
Bank Bumiputra Malaysia Berhad v. Technology & Systems Development Corporation (M) Sdn. Bhd. 3 Ors. [1989] 2 CLJ 987 ***(refd)***
Malayan Banking Bhd. & Anor. v. Swasta Jaya Sdn. Bhd. [1990] 2 MLJ 12 ***(refd)***
Hashim bin Din v. Sato Kogya Co. Ltd. [1988] 1 MLJ 527 ***(refd)***

Legislation referred to:
Rules of the High Court 1980 O. 18 rr. 2(1)19(1)(a), O. 32 r. 13(2)(b)

For the plaintiff - S.K. Yap; M/s. Yusuf Lee Pathma & Marbeck
For the defendant - K.W. Phua; M/s. Phua & Partners

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

On 19 November 1991, the defendant had applied by summons in chambers at encl. 15 for the plaintiff's action against them to be dismissed with costs as it disclosed no reasonable cause of action pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 (hereinafter "the Rules").

On 9 December 1991, the plaintiff had filed a summons in chambers at encl. 18 applying to expunge from the Court's records and to strike out pursuant to O. 18 r. 19(1) of the Rules the defences of the defendant filed on 21 December 1990 and 27 May 1991 respectively on the grounds that they disclosed no reasonable cause of defence, are scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of this action or are otherwise an abuse of process of Court, are irregular, and that judgment be entered for the plaintiff with costs of this action and costs occasioned by the application on the grounds that the defendant had failed to serve both the defences in compliance with the Rules, and that all further proceedings be stayed.

On 27 January 1992, the learned Senior Assistant Registrar had allowed the defendants application at encl. 15 on the grounds that the action was time barred. The plaintiff had accordingly filed an appeal at encl. 20 against that decision on 30 January 1992 and when the parties appeared before me on 20 May 1992, learned Counsel for the plaintiff had argued that although both encl. 15 and 18 had been fixed to be heard together, only encl. 15 had been heard by the learned Senior Assistant Registrar. In the process of arguments, she had submitted a fair bit on encl. 18 as well for which I had stopped her, as the appeal was only with regard to encl. 15, and having adjourned to decide, I had on 10 June 1992 allowed the appeal against the decision in respect of encl. 15 with costs on the grounds that the pleadings were in issue and that since the application was under O. 18 r. 19(1)(a) of the Rules, no affidavit evidence was admissible.

On 24 January 1994, the parties appeared before me for encl. 18 but learned Counsel for the defendant had applied for a postponement as she was not prepared and was leaving the firm. Learned Counsel for the plaintiff had no objections. On 27 April 1994, learned Counsel for the plaintiff had asked for an adjournment to file an affidavit in reply and learned Counsel for the defendant had readily agreed because he wanted another summons in chambers at encl. 40, which he had filed on 20 April 1994, to be heard together with encl. 18.

The application at encl. 40 was for leave for the defendant to make the application, for an extension of time to make the application, for leave to file a defence to the action and consequently for leave and extension of time to file the defence within fourteen days of the order, costs in the cause, any other relief deemed suitable and appropriate by the Court, or for a declaration that by necessary implication the order of Court dated 20 May 1991 had given the defendant leave to file the defence to the action within a reasonable time and that the statement of defence is valid and in order, costs in the cause and any further relief which the Court deemed suitable and appropriate. In effect, the first limb of that application was for an extension of time to file a third defence within fourteen days of the order and the second limb was for the Court to declare the second defence valid.

At the hearing of both encls. 18 and 40 on 7 August 1994, learned Counsel for the plaintiff had submitted that the further affidavit of the defendant at encl. 38 filed on 10 April 1994 should be struck out in view of O. 32 r. 13(2)(b) of the Rules as it had been filed without obtaining leave of the Court. He added that the defendant had filed two defences but both were out of time and without the leave of the Court for enlargement of time. In fact, he said, the second defence was an amendment of the first without leave to amend the first defence having been obtained. Learned Counsel had continued by saying that there had been no application for enlargement of time from 15 December 1990 until 20 April 1994, a period of four years and five months and there was also no application for leave to amend the first defence since 27 May 1991.

He had then set out the sequence of events. The statement of claim was dated 7 November 1990 and the memorandum of appearance was dated 21 November 1990. The last day for filing the statement of defence was 5 December 1990 as provided for under O. 18 r. 2(1) of the Rules. The judgment in default of defence was dated 20 December 1990 and the first defence was filed the day after. The application to set aside the judgment in default was dated 4 February 1991. The question of limitation was never pleaded in the first defence. Consequently, the judgment in default was set aside on 20 May 1991 and the second defence was filed on 27 May 1991 with a new paragraph 14 on the limitation point. Learned Counsel had concluded that the defendant cannot now say that the first defence was invalid as the Court had already decided on the limitation issue at the hearing of the appeal and accordingly both the defences were unauthorised pleadings.

Learned Counsel for the defendant had replied that the crux of the problem was that when the learned Senior Assistant Registrar had allowed their application to set aside the judgment in default after considering the merits, there was no mention of when the new defence was to be filed. He admitted that they had made a slip and despite the first defence being in the file, they had filed another defence. Also, they were under the impression that the first defence was invalid. To overcome the situation, they had filed encl. 40. In these circumstances, he argued the application at encl. 18 must fail because if the first defence was considered valid, the application must be disallowed and if otherwise, the order of the learned Senior Assistant Registrar setting the judgment in default aside implicitly gave the defendant leave to defend the action which makes the second defence valid. As for the delayed affidavit, he had explained that they had just taken over the matter and he blamed the four years and five months' delay on the pending appeal.

It was my view that as far as filing of defences go, the defendant had filed it out of time by sixteen days the first time as in fact it was one day after the judgment in default of defence was filed on 20 December 1990. O. 18 r. 2(1) of the Rules states "Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.". It is not disputed that leave for an extension of time had not been given by the Court and in these circumstances, the judgment in default appears to be in order. In fact, from the records, learned Counsel for the defendant had admitted this at the hearing to set aside the judgment in default before the learned Senior Assistant Registrar. That application had been filed by way of a summons in chambers at encl. 8 on 5 February 1991. There was also a prayer to stay all execution proceedings and for costs in the cause. The third paragraph of the supporting affidavit to that application had stated "I wish to state that the defendant did not file its defence on time as a result of a mistake/oversight on

the part of the solicitor in charge of the matter, Mr. Phua Kia Wui who made a mistake in the KIV (keep-in-view) list. The said Mr. Phua Kia Wui has since left the employ of the defendant's firm.". It is interesting to note that it is still the same Counsel who is appearing for the defendant at this stage despite what has been stated in the affidavit. On 20 May 1991, the learned Senior Assistant Registrar, having heard learned Counsel for the defendant and in the absence of learned Counsel for the plaintiff, had allowed the said application.

From her minutes, it is apparent that she had done so based on the defence of merits. It must be observed, however, that the first defence was filed out of time and despite the learned Senior Assistant Registrar setting aside the judgment in default, the first defence, in my considered opinion, would continue to be invalid. It was also my view that it may not be wrong for the learned Senior Assistant Registrar to have allowed the application but at the same time, she should have made an order as to the necessity of filing the defence again because the fourteen day period runs from the date the statement of claim was served on the defendant or after the time limited for appearing, whichever is the later, and leave was therefore necessary to file the defence at that late stage although the judgment in default had been set aside. Without the leave of the Court, the second defence has also not been properly filed and cannot be considered to be a proper defence.

In *Ong Guan Teck & Ors. v. Hijjas* [1982] 1 MLJ 105 it was held that "(1) the Court has an unfettered discretion to grant or refuse an extension of time; (2) the rules of Court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period; (3) in considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the Court exercising the discretion; On the facts of the present case there was not any valid ground for the delay and therefore the application for extension of time must be refused.".

The Judicial Committee of the Privy Council had decided in *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228 that "(1) the Board will not interfere with the discretion exercised by a lower Court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice. Upon questions of procedure the Board is slow to interfere with the discretion exercised by a local Court; (2) to justify an extension of time for the filing of the record there must be material upon which the Court could exercise its discretion, for otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation.".

As for the oversight of the solicitor, the High Court at Singapore had in *Tan Chai Heng v. Yeo Seng Choon* [1981] 1MLJ 271 ruled that "the facts disclosed in the affidavit showed gross negligence on the part of the appellant's solicitor and did not merit the exercise of judicial discretion in favour of the applicant.".

Accordingly, for encl. 18, it was my view that both the defences were not valid and I had granted the order in terms of the plaintiff's application. As for encl. 40, granting the orders prayed would mean the Court was aiding the negligence of Counsel for the defendant who, after filing the first defence late, never asked the Court for specific instructions or for leave to file the second defence, when it set aside the judgment in default, and had filed the second

defence purely on the basis of implication. In all probability, the learned Senior Assistant Registrar had not made the order as she was of the erroneous view that the first defence was in fact valid. It was now, to my mind, too late in the day, after four years and five months, for the defendant to again apply to file the third defence. It is also abundantly clear that the application to declare the second defence valid lacks merit in these circumstances. I had accordingly dismissed encl. 40 with costs.